Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-77

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN, JR., as EXECUTOR OF THE ESTATE OF HOWARD J. O'BRIEN, Deceased, and F. STUART O'BRIEN,

Petitioners-Appellants,

— *vs* —

CITY OF SYRACUSE, ERNEST W. SPEACH, COMMISSIONER, and SYRACUSE URBAN RENEWAL AGENCY, JOHN W. HILDEBRANDT, ASSISTANT SECRETARY,

Respondents-Respondents.

ON APPEAL FROM NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

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In The

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No.

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN, JR., as EXECUTOR OF THE ESTATE OF HOWARD J. O'BRIEN, Deceased, and F. STUART O'BRIEN,

Petitioners-Appellants,

— *vs* —

CITY OF SYRACUSE, ERNEST W. SPEACH, COMMISSIONER, and SYRACUSE URBAN RENEWAL AGENCY, JOHN W. HILDEBRANDT, ASSISTANT SECRETARY,

Respondents-Respondents.

ON APPEAL FROM NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment entered in the Supreme Court, County of Onondaga, State of New York, on April 14, 1977, and submit their statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

1. (a) The above case was cited as follows: New York Court of Appeals: 40 N.Y. 2d, 809 (official), 41 N.Y. 2d, 1008 (official), Appellate Division of the Supreme Court of New York, Fourth Department, 54 A.D. 2d, 186 (official) 388 N.Y.S. 2d, 866 (unofficial), Supreme Court, Onondaga County,

State of New York, 74 Misc. 2d, 835 (official), 346 N.Y.S. 2d, 79 (unofficial).

The decisions of the Courts above noted are appended hereto. (See Index to Appendix)

JURISDICTION

1. (B) (i) This proceeding was initially instituted as an Order to Show Cause why the City should not be forced to condemn the property in question, the proceeding was subsequently converted by Order of Justice Stewart F. Hancock, Jr., Justice of the Supreme Court, County of Onondaga, State of New York into one under New York Civil Practice Laws and Rules Section 7804, which article is entitled "Proceeding Against Body or Officer".

(ii) The judgment sought to be reviewed was entered April 14, 1977 at 3:57 p.m.; the Notice of Appeal herein was field May 27, 1977 in the Supreme Court, County of Onondaga, State of New York.

(iii) Title 28 United States Code, Section 1257 (2)
Title 28 United States Code, Section 2103
Title 28 United States Code, Section 1257 (3)

(iv) *Anonymous Numbers 6 and 7* vs. *Baker*, 79 S. Ct. 1157, 360 U. S. 287, 3 L. Ed. 2d, 1234, *Rohr Aircraft Corp.* v. *San Diego County*, 80 S. Ct. 1050, 362 U.S. 628, 4 L. Ed. 2d 1002, *Pumpelly* v. *Green Bay and Mississippi Canal Co.*, 80 U.S. 166, 13 Wall. 166, 20 L. Ed. 557.

(v) *Early Land Acquisition Ordinance*, Proceedings of the Syracuse Common Council, Monday, July 18, 1966, as amended by *Ordinance Amending Ordinance of July 18, 1966, etc.*, Proceedings of the Syracuse Common Council, Monday, November 21, 1966. (Set out in Appendix p. A35) General Municipal Law, Section 506, McKinney's Consolidated Laws of New York, Vol. 23, p.p. 330 and 331, Chapter 24, Consolidated Laws of New York. (Set out in Appendix p. A34)

QUESTIONS PRESENTED

(C) 1. Is it a constitutional "taking" within the terms of the Fifth Amendment to the United States Constitution and New York Constitution, Article 187, and therefore deprivation of property without just compensation, when a municipality enters and exercises authority over premises belonging to an individual, enticing, assisting and inducing tenants to vacate those premises conducting an auction of tenants personal property on the premises, arranging for termination of utility service, obstructing entry to and from said premises, reducing said structure from a profit producing enterprise to a status of such a loss that funds sufficient to maintain the structure itself and the attendant property taxes were no longer generated, causing the property to be sold on a tax deed for one-seventh of its estimated value.

(C) 2. Is such an application of a statute or ordinance to inflict such extensive and awesome damage upon an individual's property rights constitutional.

STATEMENT

D. The statement of the case is as follows: Petitioners-Appellants first commenced this proceeding by an Order to Show Cause and accompanying papers wherein an order was sought in the nature of a Writ of Mandamus to compel the respondents herein to condemn the petitioners property located at 208, 210-215 West Water Street in the City of Syracuse. Special Term of the Supreme Court, County of Onondaga, State of New York, treated said application as an Article 78 Proceeding by considering the moving papers as a petition under Article 78 of the Civil Practice Law and Rules of the State of New York and the papers in opposition to the original Show Cause Order as a motion to dismiss. Special Term denied the motion to dismiss and granted a preference for trial which trial was held in Supreme Court, Onondaga County before the Honorable Thomas Aloi. At the close of the petitioner's proof,

the respondents herein moved for an order of dismissal without introducing any additional proof and again moved at the close of the case. This motion was granted. A judgment and order to that effect were entered in the Onondaga County Clerk's Office on July 14, 1975. The decision of that Court was appealed to the Appellate Division of the Supreme Court State of New York, Fourth Department, which Court unanimously affirmed and an order to that effect was entered in the Clerk's Office of said Court on the 5th day of November, 1976. Thereafter, petitioners moved for leave to appeal to the New York Court of Appeals which motion was denied and the petitioners thereafter moved under the Civil Practice Law and Rules of the State of New York for leave to appeal as a right. The New York Court of Appeals thereafter rendered a decision finding that no substantial constitutional question was presented dismissing the appeal, and the order and judgment thereon were entered on April 14, 1977.

The petitioners-appellants herein, F. Stuart O'Brien and his brother Howard J. O'Brien, purchased property located at 208, 210-215 West Water Street in the City of Syracuse, New York in 1946. The petitioner-appellant, Howard J. O'Brien, Jr., is the Executor of the Estate of Howard J. O'Brien.

The property consists of a four and part-five story building with full utilities and this building had access to both Water Street and Erie Boulevard West in the City of Syracuse, with the main entrance to the building on Water Street. The rentals consist of storage on the ground level with office space above ground level.

This property was designated as block 92, Parcel 4, in an Urban Renewal Plan known as "Clinton Square", which was adopted on July 22, 1968 by the Syracuse Common Council. An Early Land Acquisition Ordinance was passed on July 8, 1966 and the same was amended on November 21, 1966. The plan as adopted included the petitioners' property and it was indicated the petitioners' property was scheduled for acquisition.

In April, 1966, the first public meeting was held wherein the petitioners were told that their property was to be taken and demolished for a roadway. Thereafter, the Syracuse Urban Renewal Agency undertook an aggressive program to ready the area for redevelopment. This policy consisted of wide publicity being given to the projects through newspaper releases and notification to all tenants and owners in the area, that the properties located within the project area would be acquired and razed.

It was the policy of the Urban Renewal Agency to first remove the tenants of the properties that were first scheduled to be purchased or taken. While no financial assistance could be given until federal approval had been given of the plan, much of the prior planning had been accomplished prior to the February 17, 1969 funding approval date. The first of the petitioners' tenants (then numbering about 12) was moved out on March 10, 1969, thus making said tenant one of the first to be relocated within the project. Subsequently, four other tenants received financial assistance totaling approximately $18,000.00 to vacate petitioners' premises. One of the tenants who received relocation assistance money has moved out with two years remaining under a lease. Petitioners' protests were to no avail.

Because of the policy of the Urban Renewal Agency of tenant removal and their announced intention that the properties would be acquired, there was no possibility of leasing space to other tenants. As a result, the income of the building dropped rapidly from a profitable situation to a losing situation. The agency, as part of its ongoing program of tenant relocation obtained a key to the premises leased to one of the building's tenants, and retained the key without knowledge on the part of the petitioners for a period in excess of two years. Similarly, on or about November 25, 1972, the agency without the permission of petitioners and without consultation, advertised in a local paper, hired an auctioneer, and conducted a public sale of equipment remaining on the premises leased to the Postmark

Restaurant, a tenant who had vacated the building at the Agency's direction some 24 months earlier. Petitioners' property was left in a damaged condition after the auction. In addition to this obvious interference by the agency, the petitioners have been subjected to further invasion of their rights by the termination of the water and gas service to the premises, a termination mandated by a party other than the petitioners or their agents. A request for resumption of water service was not complied with by the City of Syracuse up to and including the time of the sale of the property for default in taxes, despite the fact that petitioners were not economically capable of using the premises in that condition.

Solely as a result of the agency's activities, the rental income of the properties had declined to a mere $200.00 a month. In spite of this paucity of income the City Assessors for the year 1972, raised the assessment on petitioners' property from $66,900.00 to $85,800.00. Petitioners, because of the removal of their tenants and the inability to attract new tenants due to the activities of the agencies, were unable to generate sufficient revenues from the property to pay any taxes. As a result, the property was acquired by the City at a tax sale.

The federal question sought to be reviewed or raised from the outset of the litigation in the pleadings on the original action have been consistantly raised at each stage of the litigation. Each of the contentions raised, with particular reference to those federal questions sought to be reviewed, were rejected at each stage of the proceedings and the opinions of those judges so determining the issues are appended hereto. (See Index to Appendix)

SUBSTANTIAL QUESTIONS PRESENTED

The basic issue on this appeal and the question sought to be answered is: To what extent may the state or a municipality inflict damage upon property owners in their attempt to remedy the serious problems of the cities of this nation, before

such infliction may be found to be a "taking" under the United States Constitution Fifth Amendment and Article 187 of the New York State Constitution.

It is not here questioned whether or not the State or municipality in the proper exercise of its police power may condemn a structure, the question is, how far may they go in their physical intrusion upon the rights of individual ownership before they may be deemed to have "taken" the property in question requiring that they justly compensate the property owners.

As the statement of facts relates, it would be quite proper to characterize the activity of the municipality in this case as offensive, reflecting an obvious disregard for the rights of the appellants herein, contrary to the general principles of justice and fairness enunciated by this Court in the case of *Pumpelly* vs. *Green Bay and Mississippi Canal Co.*, 80 U.S. 166, 13 Wall. 166, 20 L. Ed. 557.

It has been argued by the appellees herein that what has occurred to the appellants is merely "condemnation blight". The theory of condemnation blight is one which is widely recognized as a justification for the infliction of minor, and, in most cases, difficult to measure damages upon those with property situated adjacent to "Urban Renewal" programs. The term is apparently relative and becomes a mere exercise in semantics when the actions of a municipality have completely destroyed the value of the structure, without compensation to the owners.

Even if the activities of the municipality herein could be construed by some stretch of the imagination as damage incidental to the condemnation of other structures in the area, to deny the appellants herein their just compensation is to state essentially that a municipality has not "taken" property although they may have physically destroyed it.

In the present appeal there has been physical invasion and intrusion onto private property, which intrusion would not have been permitted or tolerated had the appellants any idea

of what was about to occur, and had the City of Syracuse not misrepresented their purposes.

The presentation of this appeal offers to the Supreme Court the opportunity to lay down property standards to guide the states and municipalities in their attempt to solve the obviously vast problems associated with urban renewal. These determinations are important not only to the rights of the individuals which are involved herein, but have a far-reaching effect on other individuals residing in urban areas including but not limited to small businessmen.

It is well known that throughout the entire nation, cities are struggling to survive the vast emigration to the suburbs by those individuals who are most capable of providing tax revenue to the cities and it is a fact that a large number of building owners and commercial areas of cities are small businessmen as were the appellants herein.

The progress of urban renewal programs will undoubtedly have a strong impact on this particular class of businessmen, threatening their existence even further than the pressures of an economy out of control.

There must be some protection afforded to these individuals especially when one considers that it is their tax dollar that provides the greatest revenue to the city. If the cities are to continue to exist on their own, without the aid of federal programs, immigration to the city should be encouraged, not discouraged as they would be by the actions which took place in this case.

If this activity is allowed to occur in this instance without consideration of the rights of the individuals involved, the cities will be in possession of unbrideled power, capable of arbitrary exercise, clumsily intruding upon the rights of innocent citizens and businessmen whose positions are already somewhat precarious.

This is an obvious case of abuse of the police power of the states with a severe and willful deprivation of the rights of the appellants, and to characterize it as a mere condemnation blight, as opposed to an actual "taking", requiring compensation to the appellants, is offensive to the basic principles of constitutional law.

Curiously enough, this case presents issues which have both conservative and liberal appeal. On the one hand, the individual rights involved have clearly been violated and the decisions of the Courts of New York State are clearly in error. On the other hand the rights of and possibly the very existence of the small businessmen within urban areas are potentially endangered.

To reiterate, the Supreme Court by virtue of this appeal has the opportunity to lay down proper standards for determining at what point a state or municipality has "taken" property in the constitutional sense, therefore requiring compensation be paid to the property owners. Those standards laid down by the Court in *Pumpelly, supra,* should be made more certain and the rights of citizens enumerated.

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APPENDIX

APPENDIX – Order of the Court of Appeals, dated 3-29-77.

4 Mo. No. 253

In the Matter of
the Application of Howard J.
O'Brien, as Executor &c. of
Howard J. O'Brien, Deceased,
& ano., Appellants,

vs.

City of Syracuse, et al.,
Respondents.

MAR 29 1977 Rec'd 4-1-77

Motion to dismiss the appeal herein granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

APPENDIX — Order of the Court of Appeals, dated 3-29-77.

STATE OF NEW YORK,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of March A.D. 1977

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding*

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4 Mo. No. 253
In the Matter of
the Application of Howard J. O'Brien, as Executor &c. of Howard J. O'Brien, Deceased, & ano., Appellants,
vs.
City of Syracuse, et al., Respondents.

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX — Judgment, dated 4-14-77.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN, JR., as EXECUTOR OF THE ESTATE OF HOWARD J. O'BRIEN, deceased, AND F. STUART O'BRIEN,

Petitioners,

— against —

CITY OF SYRACUSE, ERNEST W. SPEACH, COMMISSIONER, AND SYRACUSE URBAN RENEWAL AGENCY, JOHN W. HILDEBRANDT, ASSISTANT SECRETARY,

Respondents.

Index No. 73-907

The above named Respondents moved for dismissal of the Appeal to the Court of Appeals, said motion being returnable on the 7th day of March, 1977 at the Court of Appeals Hall in the City of Albany, New York, and the said motion having been granted and the Appeal dismissed upon the ground that no substantial constitutional question is directly involved, a copy of said Order is attached hereto, and said Order granting Respondents, City of Syracuse, Ernest W. Speach, Commissioner, and Syracuse Urban Renewal Agency, John W. Hildebrandt, Assistant Secretary, costs and twenty dollars ($20) cost of motion,

N O W, on motion of Thomas J. Lowery, Jr., Special Counsel for the City of Syracuse, it is

ORDERED, ADJUDGED AND DECREED that the appeal in the above captioned proceeding be and is hereby dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that pursuant to the aforementioned Order of the Court of Appeals

that the Respondents, City of Syracuse, Ernest W. Speach, Commissioner, and Syracuse Urban Renewal Agency, John W. Hildebrandt, Assistant Secretary, recover of the Petitioner, Howard J. O'Brien, Jr., as Executor of the Estate of Howard J. O'Brien, deceased and F. Stuart O'Brien, the sum of twenty dollars ($20.00) motion costs and fifty dollars ($50.00) statutory costs, making in total the sum of seventy dollars ($70.00) and that the Respondents have execution therefor.

JUDGMENT signed this 14th day of April, 1977.

HARLEY G. GLASOW
Clerk DEPUTY COUNTY CLERK

CERTIFICATION
C.P.L.R. 2105 & 2106

This is to certify that I have compared this copy with the original thereof and found same to be a true and complete copy.

s/ THOMAS J. LOWERY, JR.
Attorney at Law

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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

PRESENT: CARDAMONE, J.P., SIMONS, MAHONEY, DILLON, GOLDMAN, JJ.

In the Matter of the Application of Howard J. O'Brien, Jr. as Executor of the Estate of Howard J. O'Brien, Deceased and F. Stuart O'Brien, Appellants,

— v. —

City of Syracuse, Ernest W. Speach, Commissioner, and Syracuse Urban Renewal Agency, John W. Hildebrandt, Assistant Secretary, Respondents.

The above named Howard J. O'Brien, Jr. and F. Stuart O'Brien petitioners in this proceeding, having appealed to this Court from a judgment and an order of the Supreme Court, each entered in the Onondaga County Clerk's office on July 14, 1975 and said appeal having been argued by John Lawton of counsel for appellants, Thomas Lowery of counsel for respondents, and due deliberation having been had thereon,

It is hereby ORDERED. That the judgment and order so appealed from be, and the same hereby are unanimously affirmed without costs.

Opinion by Cardamone, J.P., which is hereby made a part hereof.

Entered: November 5, 1976

MARY F. ZOLLER, *Clerk*

APPENDIX — Order of Appellate Division, Fourth Department, entered 11-5-76.

Supreme Court
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

(SEAL)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 5 DAY OF NOV 1976

s/ MARY F. ZOLLER
Clerk.

CERTIFICATION
C.P.L.R. 2105 & 2106

This is to certify that I have compared this copy with the original thereof and found same to be a true and complete copy.

s/ JEFFREY L. HILL
Attorney at Law

APPENDIX — Order of Appellate Division, Fourth Department, entered 11-5-76.

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (*certified*) true copy of a Order duly entered in the office of the clerk of the within named court on November 5, 1976 and filed in the Onondaga County Clerk's Office on November 16, 1976.

Dated, 11/17/76

Yours, etc.,

LOWERY, CARRIGAN AND KEOUGH
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To

Attorney for

APPENDIX — Decision of Appellate Division, Fourth Department, 11-5-76.

580. (Onondaga Co.) - In the Matter of the Application of Howard J. O'Brien, Jr., as Executor of the Estate of Howard J. O'Brien, Deceased, and F. Stuart O'Brien, Appellants, v. City of Syracuse, Ernest W. Speach, Commissioner, and Syracuse Urban Renewal Agency, John W. Hildebrandt, Assistant Secretary, Respondents. - Judgment and Order unanimously affirmed without costs. Opinion by Cardamone, J.
(Appeal from Judgment and Order of Onondaga Supreme Court, Aloi, J. - Article 78.) Present: Cardamone, J.P., Simons, Mahoney, Dillon, Goldman, JJ.

APPENDIX — Opinion of Appellate Division, Fourth Department, 11-5-76.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of Howard J. O'Brien, Jr., as Executor of the Estate of Howard J. O'Brien, Deceased, and F. Stuart O'Brien, Appellants,

— vs —

City of Syracuse, Ernest W. Speach, Commissioner and Syracuse Urban Renewal Agency, John W. Hildebrandt, Assistant Secretary, Respondents.

No. 580/1976
No. 580/1976

ARGUED: September 14, 1976
DECIDED: November 5, 1976

PRESENT:

HON. RICHARD J. CARDAMONE, Justice Presiding

HON. RICHARD D. SIMONS,
HON. WALTER J. MAHONEY,
HON. MICHAEL F. DILLON,
HON. HARRY D. GOLDMAN, Associate Justices

Appeal from Judgment and Order of Onondaga Supreme Court, Aloi, J., dismissing complaint in action for damages for alleged de facto taking of property.

APPEARANCES:

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CARDAMONE, J.P.:

In the instant case petitioners, owners of commercial realty in Syracuse, attempted to prove acts which resulted in a de facto appropriation of their property. They allege, in addition to the loss of rental income and reduction in market value, additional factors such as interruption of utility service, a public auction held by the respondent Urban Renewal Agency (URA) without their consent on the premises, building and construction materials piled around the building and interference with access as a result of construction.

Both the Fifth Amendment to the Federal Constitution and Article 1, section 7 of the New York State Constitution provide that property shall not be taken for public use without just compensation. In Danforth v. United States (308 US 271) the Supreme Court defined the constitutional parameters of the Fifth Amendment's "just compensation" clause and stated that "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense" (id. at 285). The New York courts have strictly adhered to the requirement of finding an actual taking. In the leading case of City of Buffalo v. Clement Co., (28 NY2d 241) the Court of Appeals held:

> "Accordingly, the mere announcement of impending condemnations, coupled as it may well be with substantial delay and damage, does not, in the absence of other acts which may be translatered into an exercise of *dominion and control* by the condemning authority, constitute a taking so as to warrant awarding compensation (id. at 257)" (emphasis supplied).

This court recently held in Fisher v. City of Syracuse (46 AD 2d 216, mot. lv. to app. den; 36 NY2d 642; cert. den. 423 US 833) that damages suffered by "condemnation blight" in the form of depreciation in value and increased maintenance costs during an inordinately long and dilatory implementation of an urban renewal program are not compensable.

Significant public policy considerations underlie the rule requiring an actual physical taking. Were the date of the announcement of the impending condemnation to constitute a "de facto" taking, it would (1) impose an unwarranted burden upon the condeming authority, penalizing it for providing notice to a property owner and perhaps foster a converse policy of secrecy which "would be raise (greater) havoc with an owner's rights" (28 NY2d at 256); (2) might render the construction of public improvements so inordinately expensive as materially to retard development of the state; and (3) create discrimination against public improvements since an owner should not be recompensed for every damage to his real estate, but only when the damage was inflicted for the public use (2A Nichols on Eminent Domain, Rev. 3rd Ed., Taking and Damage, Sec. 6.441 [1]).

Petitioners' proof at trial respecting these claims was not free from doubt; even were the allegations conclusively proven, they would not, taken cumulatively, constitute the dominion and control necessary to establish a de facto taking. We consider briefly each of petitioners' O'Briens claims.

The negligent failure to provide water service might give rise to municipal tort liability (see, 1A Antieau, Municipal Corporation Law, Sec. 11.102), but on the facts here such interruption of service does not rise to the level of interference with possessory rights required to constitute a de facto appropriation, since no demand for restoration of service was made until after this action was commenced.

URA acquired a key to a tenant's premises in the O'Brien building, retained it for two years, and then conducted an auction on the premises without the landlord's consent after the tenant's lease had expired. This was undoubtedly a violation of the O'Briens' exclusive possessory rights. Where, however, the unauthorized entry amounts to no more than a temporary intrusion, compensation for any damages suffered may be obtained in an action for trespass. It is only where the intrusion is so extensive in scope or duration that it may be regarded as a taking in fact that the right to compensation under eminent domain can be invoked. Testimony established that during the construction of the federal complex, building materials were piled along the Water Street side of the O'Brien building, but access to the building itself, although restricted, was not totally obstructed. Under New York law, municipal corporations "are liable when the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him" (40 NY Jur., Municipal Corps., Sec. 976). However, a municipality may not ordinarily be held liable for the tortious conduct of independent contractors it employs (1A Antieau, supra, at Sec. 11.04). Even were it assumed that respondents authorized the piling of materials against petitioners' building, the use of lands adjoining a construction site for the purpose of materials storage constitutes a mere trespass, not a taking (2 Nichols, supra, Sec. 6.11, n.17). A temporary intrusion of such a limited nature, inflicting no permanent damage, does not amount to the exercise of that degree of dominion and control indicative of a de facto taking (Litchfield v. Bond, 186 NY 66). Any inconvenience and depreciation in value suffered as a result of the impaired ingress and egress was incidental to a permissible exercise of the police powers and is *damnum absque injuria* (Bopp v. State, 19 NY2d 368; Cities Serv. Oil Co. v. City of New York, 5 NY2d 110, cert den 360 US 934; Jones Beach Blvd. Estate v. Moses, 268 NY 362; Tucci v. State, 28 AD2d 774, affd 29 NY2d 836; Jablowski v. State, 267 App Div 54, affd 292 NY 652).

Petitioners make several other arguments which they believe entitle them to relief. They assert that even if there was not a de facto taking, respondents' *delay* in implementing the urban renewal plan and petitioners' consequent injuries amounted to a constitutional taking under 76 Crown Street Corp. v. City of New York (35 AD2d 1005), and in Matter of Charles v. Diamond (47 AD2d 426). This reliance is misplaced. *Crown* specifically contemplated an eventual de jure taking, not indicated from the proof in this case; and, in *Charles* not only was no public purpose served by the town's delay in improving its sewage facilities, but the municipality's failure to act expeditiously was directly contrary to a consent order entered with the Department of Environmental Conservation.

Petitioners further claim that after the failure to achieve a negotiated settlement, the respondent Common Council of Syracuse had an obligation to consider fairly and in good faith the option of initiating condemnation proceedings against their property. They suggest that to permit approval to be withheld merely on the whim of the local governing body vitiates the intent of Congress; and claim that the evidence demonstrates non-compliance with the Handbook by the URA and bad faith on the part of the City. Concededly, the URA departed in some respects from the procedures outlined in the UR Handbook in failing to give petitioners a final written offer and notice of intention to condemn. The Handbook does not, however, mandate the acquisition of all property within the project area, nor does it require that once negotiations are commenced the property be acquired. On the contrary, the requirement that condemnation decisions be made with the participation of the Common Council indicates a clear intent that such decisions be discretionary. The URA director testified at the trial concerning the contingent character of the acquisition plans in particular and the urban renewal plan in general. We conclude that the trial court's finding that no bad faith had been established is amply supported by the record.

Petitioners final argument is that they are third party beneficiaries of the Loan and Capital Grant Contract between the URA and HUD, requiring the agency to "carry out the Project with all practicable dispatch, in a sound, economical, and efficient manner and in accordance with the Urban Renewal Plan and the provisions of this Contract . . . ." They contend that respondents were also bound to observe the more particularized procedures described in the UR Handbook. The contract between the URA and HUD has as its objective the implementation of certain minimum federal standards for the protection of property owners displaced by urban redevelopment projects. Section 402 of the Housing and Urban Development Act of 1965 (Act of August 10, 1965, Pub. L. No. 89-117, 79 Stat 485; formerly codified at 42 USC 3071 et seq), and its successor, section 305 of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1971 (42 USC 4651) are the sources of this federal mandate to deal fairly and expeditiously with property owners affected by federally funded redevelopment programs. Section 102(a) of the 1971 Act (42 USC 4602(a)) which provides that the statutory sections relating to land acquisition procedures "create no rights or liabilities has been construed as an express preclusion of judicial review of claims arising from the failure to observe the required acquisition procedures (Barnhart v. Brinegar, 362 F Supp 464). Although the 1965 Act contains no parallel provision, the Ninth Circuit Court of Appeals in Johnson v. Redevelopment Agency (317 F2d 872) held that residents of an urban renewal redevelopment area lacked standing to complain about municipal violations of a funding contract executed under Title I of the Housing Act of 1949 (Act of July 15, 1949, Pub. L. No. 81-171, 63 Stat 413, formerly codified at 42 USC 1441 et seq). The Court noted that:

> "The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on (state) agencies by the United States, although those suing would benefit from such enforcement" (id. at 874).

The barriers to liability posed by *Barnhart* and *Johnson*, together with the absence of any authority for the imposition of contractual liability under the 1965 Act persuade us not to forge a new dimension of federal contract law with unknown consequences upon the operation of urban renewal projects. Even were we so inclined, the record fails to reveal such violation of the contract as would warrant the imposition of liability upon respondents.

Finally, it is abundantly evident that a serious economic loss has been inflicted on petitioners under the banner of urban renewal progress. Other courts under like circumstances have declared a compensable de facto taking (Foster v. City of Detroit, 405 F2d 183 (6th CCA); Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 343 A2d 408). The Court of Appeals in *Clement* stated that while there may be no de facto appropriation absent a physical invasion or direct legal restraint, the rule might be otherwise in cases of "the most obvious injustice" (supra, at 253). While sympathetic to petitioners' plight, we observe that an economic loss is not necessarily an injustice. Absent evidence of acts by respondents which demonstrates the exercise of dominion and control or evidence of respondent's bad faith sufficient to categorize the circumstances as an obvious injustice there is no basis here to declare a de facto taking.

Simons, Mahoney, Dillon and Goldman, JJ., concur.

AT a Trial Term of the Supreme Court held in and for the County of Onondaga at the County Court House in the City of Syracuse, New York, on the 5-7, 11-14, 17, 18 and 24th days of March, 1975.

PRESENT: HONORABLE THOMAS ALOI,
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN JR., as Executor of the Estate of HOWARD J. O'BRIEN, Deceased, and F. STUART O'BRIEN,

Petitioners,

vs.

CITY OF SYRACUSE, ERNEST W. SPEACH, COMMISSIONER, and SYRACUSE URBAN RENEWAL AGENCY, JOHN W. HILDEBRADT, ASSISTANT SECRETARY,

Respondents.

Index No. 73-907

A trial preference having been granted by this Court in the above entitled proceeding, and the same having been reached for trial, and the Petitioners having submitted their testimony and proof, the Respondents having offered no proof, and the Respondents having moved for judgment at the close of the Petitioners' testimony and proof, and upon the close of all the evidence, upon the grounds that the Petitioners have failed to prove the allegations set forth in their petition and have

failed to establish a prima facie case of a de facto taking as a matter of law on the part of the Respondents, City of Syracuse, and Syracuse Urban Renewal Agency, and the Court having entertained the motion, and

N O W, after hearing Thomas J. Lowery, Jr., Special Counsel, for the Respondents, in favor of said motion, and William F. Fallon, Attorney for the Petitioners, in opposition thereto, and this Court having rendered its decision in writing in respect to said motion, it is

ORDERED that the Respondents' motion for judgment in their favor and that final judgment in favor of the Respondents, and against the Petitioners be entered herein, together with the costs and disbursements of this Proceeding.

SIGNED this 28th day of April, 1975 at Syracuse, New York.

ENTER:

s/ Thomas Aloi,
Justice of Supreme Court

APPENDIX – Judgment, dated 4-28-76.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN JR., as Executor of the Estate of HOWARD J. O'BRIEN, Deceased, and F. STUART O'BRIEN,

Petitioners,

vs.

CITY OF SYRACUSE, ERNEST W. SPEACH, COMMISSIONER, and SYRACUSE URBAN RENEWAL AGENCY, JOHN W. HILDEBRADT, ASSISTANT SECRETARY,

Respondents.

Index No. 73-907

The above entitled proceeding having been reached for trial on March 5, 1975 and the Petitioners having submitted their testimony and proof, and the Respondents offering no testimony and proof, and the Court having granted at the close of the evidence the Respondents' motion for judgment in their favor and having ordered final judgment to be entered accordingly, together with the costs and disbursements of the Proceeding, it is

ON MOTION of Thomas J. Lowery, Jr., Special Counsel for the Respondents

ADJUDGED that the Petitioners' complaint be dismissed and that judgment be granted in favor of the Respondents herein against the Petitioners; and it is further

ADJUDGED that the Respondents, City of Syracuse, and Syracuse Urban Renewal Agency, recover of the Petitioners, Howard J. O'Brien, as Executor of the Estate of Howard J. O'Brien, deceased, and F. Stuart O'Brien, the sum of $373.25, costs and disbursements, and that the Respondents have execution therefor.

APPENDIX – Judgment, dated 4-28-76.

JUDGMENT signed this 28th day of April, 1975 at Syracuse, New York.

s/ THOMAS ALOI
Justice of Supreme Court

APPENDIX – Decision of Justice Aloi, dated 4-14-75.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN, JR., as Executor of the Estate of HOWARD J. O'BRIEN, Deceased and F. STUART O'BRIEN

Plaintiffs,

– vs –

CITY OF SYRACUSE, Ernest W. Speach, Commissioner and SYRACUSE URBAN RENEWAL AGENCY, John W. Hildebrandt, Assistant Secretary,

Defendants.

Concerning Project No. N.Y. R-214, Clinton Square Block No. 92 Parcel No. 4

APPEARANCES: OOT & FALLON, ESQS.
Attorneys for Plaintiffs
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THOMAS J. LOWERY, JR., ESQ.
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Syracuse, New York 13202

ALOI, J.

DECISION

Respondents have moved at the conclusion of petitioners proof, for judgment dismissing petitioners complaint on the ground that petitioners have failed to establish a prima facie case of a de facto taking and to strike all testimony and exhibits introduced during the proceeding which relate to any bad faith by the local public agency and any statements which tend to establish the value of the O'Brien parcel of land.

APPENDIX – Decision of Justice Aloi, dated 4-14-75.

In considering their motions and evaluating the proof of the petitioners, it is necessary to analyze statutory and case law in connection with condemnation and appropriation.

Article 1 Section 7(a) of the New York State Constitution holds in pertinent part that, "private property *shall not be taken* for public use without just compensation." The Fifth Amendment to the United States Constitution guarantees as is pertinent to this decision that private property *shall not be taken* for public use without just compensation, while the Fourteenth Amendment expressly precludes any state from depriving "any person life, liberty or property without due process * * *."

In the landmark New York State case of City of Buffalo v. Clement Co., 28 N.Y. 2d 241, 255, Judge Scileppi maintained that, "A *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property." Thus, on the basis of the aforementioned authorities, this court believes that a *de facto* appropriation can *only* occur through a physical invasion or a direct legal restraint and that to hold otherwise would disregard the mandate of our State and Federal Constitutions and ignore the letter and intent of cogent case law.

The facts herein fail to disclose any act upon the part of the respondents which could possibly be construed as an assertion of dominion and control or direct legal restraint of the disposition of the property. The respondents have manifested a mere intention to condemn, which does not impose liability upon the theory of a "taking" for there was no appropriation of the property in its accepted legal sense. This reasoning has served repeatedly as the basis to deny recovery upon the asserted theories that the threat of condemnation (Niagara

Frontier Building Corp. v. State of New York, 33 A.D. 2d 130, 132) or a mere manifestation of an intent to appropriate (Waller v. State of New York, 144 N.Y. 579, 599) constitutes an actual taking.

The United States Supreme Court has held in Danforth v. U.S., 308 U.S. 271, 285 (1939) that: "[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense." When a governmental agency properly exercises its powers, it has been repeatedly held that although the consequences of their acts may impair the use of the land, it is not a taking within the accepted legal meaning, and therefore does not entitle the property owner to compensation or give him any right of action, Sauer v. City of New York, 180 N.Y. 27, 32-33. There has been no proof adduced during trial which indicates that respondents have acted "ultra vires" or have improperly used its authority during the proceeding.

The mere fact that someone has suffered damages does not give rise to a cause of action, unless that the cause of action has a legal basis. The items of damages alleged by the petitioners were not actually "taken" by the respondents within the contemplation of the Law of New York State. (See J. Roy decision, Fisher v. City of Syracuse.)

Petitioners have alleged, as an integral part of its case, that respondents offered to pay relocation money to the tenants which precipitated many tenants to vacate the premises in question. The parties have stipulated to the widespread publicity which existed from the beginning of 1965 to date, concerning the building being located within an urban renewal area. Testimony given by the relocation officer indicated that no tenant was ordered to move but that all tenants were notified

of their eligibility under the federal statutes to receive funds for relocation. It was shown that only five tenants took advantage of their eligibility to receive relocation funds. By providing these funds, the respondent-municipality did not improperly induce the tenants to vacate but rather provided them with the necessary funds to finance their relocation. Therefore it would be patently improper for this court to penalize the respondents for doing in a proper manner that which it was obligated to do by law.

Strong public policy considerations further militate against penalizing the municipality for providing appropriate advance notice to a property owner. To penalize the condemnor would encourage it to conceal its plans until it was ready to exercise actual dominion and control and thus would limit the time available for the tenants to make arrangements for relocation. (See City of Buffalo v. Clement, supra).

Furthermore, petitioner has alleged that respondent has acted in "bad faith" in not acquiring the property in question. This court does not recognize any cause of action for the mere "bad faith" conduct of a governmental agency in its appropriation of real property. Moreover, even assuming that there was such a cause of action, no proof has been adduced which would allow this court to sustain this cause of action.

Much of the proof submitted by the petitioners relate to the issue of condemnation blight. As stated in City of Buffalo v. J.W. Clement Co., 28 N.Y. 2d 241, 255, "condemnation blight relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits a realistic valuation of the condemned property in the subsequent de jure proceeding." It thus can be seen that condemnation blight is not a cause of action, but rather a rule of evidence to value real property which has been the subject of a taking in condemnation.

APPENDIX — Decision of Justice Aloi, dated 4-14-75.

Accordingly, it is the decision of this Court to dismiss petitioners' complaint for failure to establish a prima facie case of a *de facto* taking as a matter of law.

Submit order.

THOMAS ALOI
Supreme Court Justice

Dated: Syracuse, New York
April 14, 1975

APPENDIX — Order of Justice Hancock, dated 6-14-73.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN, JR., as Executor of the Estate of HOWARD J. O'BRIEN, Deceased and F. Stuart O'Brien,

Petitioners,

— vs —

CITY OF SYRACUSE, Ernest W. Speach, Commissioner and SYRACUSE URBAN RENEWAL AGENCY, John W. Hildebrandt, Assistant Secretary,

Respondents,

Concerning Project No. N.Y. R-214, Clinton Square Block No. 92 Parcel No. 4

73 907

The petitioners, Howard J. O'Brien, Jr. and F. Stuart O'Brien, having moved this Court at a Special Term on the 8th day of May, 1973 at 2:00 o'clock in the afternoon and upon reading and filing the Order to Show Cause dated the 16th day of February, 1973, the affidavits of Howard J. O'Brien and F. Stuart O'Brien, sworn to the 9th day of February, 1973 and the Affidavit of Thaddeus B. Oot, Esq., sworn to the 9th day of February, 1973, with proof of due service thereof upon the respondents, and after hearing Oot & Fallon, William J. Fallon of counsel, attorney for the petitioners in support of this Order to Show cause, it is

ORDERED, that the respondents Motion to Dismiss is denied; the respondents shall have twenty (20) days in which to file an answer from the date of service of this Order and it is further

ORDERED, that pursuant to CPLR 7804 (h) a trial is hereby ordered forthwith on the issues and the Clerk of the Supreme Court is directed to add the matter to the Trial Calendar

APPENDIX — Order of Justice Hancock, dated 6-14-73.

wherein it should have preferred scheduling when the pleadings and such pretrial or preliminary procedures to which the parties may be entitled have been completed.

ENTER:

s/ STEWART F. HANCOCK
J.S.C.

Dated at Syracuse, New York,
June 14, 1973.

APPENDIX — Decision of Justice Hancock, dated 5-23-73.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN, JR., as Executor of the Estate of HOWARD J. O'BRIEN, Deceased and F. Stuart O'Brien,

Plaintiffs,

— vs —

CITY OF SYRACUSE, Ernest W. Speach, Commissioner and SYRACUSE URBAN RENEWAL AGENCY, John W. Hildebrandt, Assistant Secretary,

Defendants.

Concerning Project No. N.Y. R-214, Clinton Square Block No. 92 Parcel No. 4

APPEARANCES: OOT & FALLON, Esqs.
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HAROLD T. LIMPERT, Esq.
Attorney for Defendants
Loew Building
Syracuse, New York 13202

Hancock, J.

DECISION

By an order to show cause and accompanying papers the plaintiffs seek, among other things, an order in the nature of a writ of mandamus compelling the defendants to take the necessary steps to condemn plaintiffs' property located in Syracuse at 208, 210-215 W. Water Street in Block 92 of the Syracuse Urban Renewal Project, known as Clinton Square Urban Renewal Project No. N.Y. R-214.

Adopting the liberal construction mandated by CPLR 104 and CPLR 103 (c), and in the interests of a speedy and inexpensive determination of the matter, the Court will treat the application as a petition in a special proceeding brought pursuant to Art. 78 of CPLR. The answering papers will be considered as a motion to dismiss the petition pursuant to CPLR 7804 (f). The title of the matter may be amended to designate the parties as petitioners and respondents respectively, and they will henceforth be so called in this decision.

It is alleged that respondent has effected a *de facto* taking of petitioners' property by placing the property in the urban renewal project; attempting to acquire the property for urban renewal during protracted negotiations; advising petitioners that the property would be condemned; causing or contributing to the removal of petitioners' renants by entering the premises and advising the tenants that the property was being taken, and paying, in part, for their moving expenses.

There is authority for the issuance of a writ of mandamus if, in fact, it is established that respondents actions have amounted to a taking. People ex rel. Sound Realty Co. v. Nicholson, 277 N.Y. 401; Cinco v. City of New York, 58 Misc. 2d 828, 206 NYS 2d 26; Robinson v. Board of Supervisors of County of Delaware, 257 App. Div. 894.

Respondents, on the other hand, relying on City of Buffalo v. Clement Co., 28 NY 2d 241, contend that there has been no *de facto* taking since "the city never, by its statements or actions, directly or indirectly, interfered or sought to exercise any control over the property, thus inferentially depriving the claimant of its possession, enjoyment or use." (28 NY 2d 241, 257.) See also Niagara Frontier Bldg. v. State of N.Y., 33 AD 2d 130 and Cicci v. State of N.Y., 31 AD 2d 733.

Further, the City contends that after the rejection by the Federal Department of Housing and Urban Development of

the City's request for approval to buy petitioners' property at $210,000.00, the plans were changed and the allocation of federal funds for the acquisition of the property for urban renewal was rescinded.

Even if petitioners cannot establish a *de facto* taking and the right to compel the City to condemn their property, they could be entitled to other relief. As stated in Niagara Frontier Bldg. v. State of N.Y., 33 AD 2d 130 at p. 133, supra:

> "In sum, there was no appropriation, temporary or otherwise, prior to the *de jure* taking on June 13, 1966, which would permit an award of damages therefor. However, claimant is not without relief. The State does not seriously dispute that its actions may have caused the tenants to move and while the State cannot be held liable for any alleged appropriation prior to June 13, 1966, it must respond in damages for any actions on its part which may have operated to decrease the value of the property in question. Thus, when the damages are evaluated on its claim for the *de jure* appropriation, the State should not be permitted to benefit from any loss sustained by claimant as the result of the State's acts beginning in 1961."

See also City of Buffalo v. Clement Co., 28 NY 2d 241, 257, supra.

Furthermore, the actions of the City, although not found to amount to a *de facto* taking, could be the basis for an award of damages by a court of equity, even where condemnation or appropriation proceedings are never instituted. Ferguson v. Village of Hamburg, 272 N.Y. 234; Trippe v. Port of New York Authority, 17 AD 2d 472; Waller v. State, 144 N.Y. 579.

Thus, an eventual decision by the Court based on the evidence, that the remedy of mandamus is not warranted would not necessarily preclude other relief. In Mtr. of Phalen v. Theat. Protective Union, 22 NY2d 34, 41, involving an Article 78 proceeding for a writ of mandamus where that relief was

held to be improper, the Court of Appeals, in remanding to the lower court for appropriate relief including incidental damages, stated:

> "The improper form in which their action has been brought and their failure to request the appropriate relief is not a bar to their receiving whatever relief they may be entitled to. CPLR 103 (subd. [c]) provides that once a court has obtained jurisdiction over the parties in a 'civil judicial proceeding' the proceeding 'shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution', and CPLR 105 (subd. [d]), which defines 'civil judicial proceeding' is clearly broad enough to include the instant proceeding, defining a 'civil judicial proceeding' as a 'prosecution, other than a criminal action, of an independent application to a court for relief.' Similarly, CPLR 3017 (subd. [a]) provides, in part, that a court 'may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded." (22 NY 2d 34, 41)

See also Matter of Corbeau Construction Corp. v. Board of Education, Union Free School District No. 9, 32 AD 2d 958; Mtr. of Avalon East, Inc. v. Monaghan, 43 Misc 2d 401; Boomer v. Atlantic Cement Co., 26 NY 2d 219, 228.

Accordingly an order may be entered:

1) Denying respondents' motion to dismiss and granting respondents 20 days in which to file an answer; and

2) Ordering a trial forthwith of the issues, pursuant to CPLR 7804 (h); directing the clerk to add the matter to the Trial Calendar where it should have preferred scheduling when the pleadings and such pretrial or preliminary procedures to

which the parties may be entitled have been completed. (CPLR 103 [b]).

Submit order.

Stewart F. Hancock, Jr.
Justice of the Supreme Court

Dated at Syracuse, New York.
May 23, 1973.

APPENDIX — Notice of Appeal to the Supreme Court of the United States.

STATE OF NEW YORK COURT OF APPEALS

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN, JR., AS EXECUTOR OF THE ESTATE OF HOWARD J. O'BRIEN, DECEASED, AND F. STUART O'BRIEN,

Petitioners-Appellants,

— *vs* —

CITY OF SYRACUSE, ERNEST W. SPEACH, COMMISSIONER, AND SYRACUSE URBAN RENEWAL AGENCY, JOHN W. HILDEBRANDT, ASSISTANT SECRETARY,

Respondents-Respondents.

Index No. 73-907

Notice is hereby given that Petitioners-Appellants above named, hereby appeal to the Supreme Court of the United States from the Final Judgment of the Court of Appeals of the State of New York affirming the decision of the Appellate Division, Fourth Department, State of New York, entered in this action on the 14th day of April, 1977.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

Yours, etc.

OOT & FALLON
Counsel for Petitioners
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Tele. No. (315) 474-4844

TO: CLERK, COURT OF APPEALS
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

APPENDIX — Notice of Appeal to the Supreme Court of the United States.

LOWERY, CARRIGAN AND KEOUGH
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MR. DAVID GARBER
CORPORATION COUNSEL
City Hall
Syracuse, New York 13202

APPENDIX – General Municipal Law, Section 506, McKinney's Consolidated Laws of New York, Vol. 23, p.p. 330 and 331, Chapter 24 Consolidated Laws of New York.

[330]

Sec. 506. Acquisition of property

1. (a) A municipality, acting through its governing body, may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of the appropriate general, special or local law applicable to the acquisition of real property by such municipality, real property or any interest therein, including but not limited to air rights, and easements or other rights of user necessary for the use and development of such air rights, to be developed as air rights sites for the elimination of the blighting influences of an area or areas consisting principally of land in streets, alleys, highways, and other public rights of way, railway or subway tracks, bridge or tunnel approaches or entrances, or other similar facilities which have a blighting influence on the surrounding area, necessary for or in-

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cidental to a program of urban renewal for residential, commercial, industrial, public, semi-public, community or other uses or combinations of such uses in accordance with an urban renewal plan for a designated area, or for a part or portion of such area, provided, however, that the acquisition of any air rights over railroad tracks, rights of way or facilities and easements or other rights of user necessary for the use and development of such air rights are to be subject to the provision of section fifty-one-a of the railroad law. The acquisition of real property within a designated urban renewal area shall in every case be deemed to be and constitute a continuous rather than separate takings.

* * * * *

APPENDIX – Proceedings of Syracuse Common Council, Monday, November 21, 1966, Ordinance Amending Ordinance of July 18, 1966.

630 MONDAY, NOVEMBER 21, 1966

ORDINANCES

NOW, THEREFORE, BE IT ORDAINED that the ordinance of this Common Council duly adopted July 18, 1966, aforesaid, after a public hearing held on due notice on July 8, 1966, be and the same hereby is amended as follows:

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1. The proposed portion of the said Clinton Square Project to be known as the Clinton Square Early Land Acquisition located within the said Clinton Square Project is, as described on Page 1, paragraph 1 of said ordinance, amended to be described as follows after the words New York Central Railroad: "as found appropriate for urban renewal on November 22, 1965, which portion proposed for the Clinton Square Early Land Acquisition is described and bounded as beginning on the north at the southwest intersection of North Clinton Street and Route 690; thence along the southern line of Route 690 east to the east line of North Salina Street; thence south along the east line of North Salina Street to the north line of James Street; thence east along the north line of James Street to the east line of South Warren Street; thence south along the north line of South Warren Street to the south line of East Water Street; thence west along the south line of East Water Street to the east line of South Salina Street; thence south along the east line of South Salina Street to the south line of West Fayette Street; thence west along the south line of West Fayette Street to the west line of South Franklin Street; thence north along the west line of South Franklin Street to the north line of West Water Street; thence east along the north line of West Water Street to the west line of North Clinton Street; thence north along the west line of North Clinton Street to the place of beginning.

APPENDIX — Proceedings of Syracuse Common Council, Monday, November 21, 1966, Ordinance Amending Ordinance of July 18, 1966.

2. Page 4, paragraph 5 of said ordinance is amended to provide that the Syracuse Urban Renewal Agency is hereby authorized to file an application with the Federal Department of Housing and Urban Development for an early land acquisition loan for an amount not to exceed $16,450,000 in accordance with the Clinton Square Early Land Acquisition.

3. That the ordinance adopted by this Common Council aforesaid on July 18, 1966, pertaining to the Clinton Square Early Land Acquisition is, except as herein modified or amended, hereby ratified and approved in all respects and the terms, conditions and findings contained therein, including the preamble thereto, are hereby reaffirmed by reference thereto, as if set forth herein in full.

Adopted.

AYES: Councilmen Ludovico, Farr, Laskowski, McMahon, Handlin, Steuart, McCarthy, Coburn, Leverton—9.

* * *

APPENDIX — Proceedings of Syracuse Common Council, Monday, July 18, 1966, Early Land Acquisition Ordinance.

330 MONDAY, JULY 18, 1966

ORDINANCES

* * *

Be It Ordained, by this Common Council of the City of Syracuse, as follows:

1. That it is hereby found and determined that the early land acquisition area is a sub-standard, insanitary, slum, blighted and decadent area, or is in danger of becoming sub-standard, or insanitary area and tends to impair or arrest the sound growth and development of the City of Syracuse and qualified as an eligible early land acquisition area under the General Municipal Law of the State of New York.

2. That the Urban Renewal Plan for the early land acquisition area, having been duly reviewed and considered, is hereby approved, and the City Clerk be and is hereby directed to file said copy of the Urban Renewal Plan with the minutes of this meeting.

* * *

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10. That, in order to implement and facilitate the effectuation of the Urban Renewal Plan hereby approved, it is found and determined that certain official action must be taken by this Common Council with reference, among other things, to possible changes in zoning, the vacating and removal of streets, alleys, and other public ways, the establishment of new street patterns, the possible location and relocation of sewer and water mains and other public facilities, and other public action, and, accordingly, this Common Council hereby (a) pledges its cooperation in helping to carry out the Urban Renewal Plan; (b) requests the various officials, departments,

boards, and angencies of the City of Syracuse having administrative responsibilities in the premises likewise to cooperate to such end and to exercise their respective functions and powers in a manner consistent with the Urban Renewal Plan; and (c) stands ready to consider and take appropriate action upon proposals and measures designed to effectuate the Urban Renewal Plan.

* * *

14. That it is hereby found and determined that there is a feasible method for the relocation of families and individuals displaced from the Urban Renewal Area into decent, safe, and sanitary dwellings, which are or will be provided in the Urban Renewal Area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities, at rents or prices within the financial means of such families or individuals, and reasonably accessible to all places of employment.

15. That the undertaking and carrying out of urban renewal activities in stages for the Clinton Square Project and for the Clinton Square Early Land Acquisition, is in the best public interest and will not cause any additional or increased hardship to the residents of such designated area.

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* * *

Now, Therefore, Be It Ordained by the Common Council of the City of Syracuse as follows:

1. That it hereby approves the acquisition of real property in the Urban Renewal Area.

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2. That it also approves the demolition and removal of any structure acquired with financial assistance provided under the Contract and the inclusion in the early land acquisition loan of funds sufficient to cover the cost of any such demolition or removal, together with administrative, relocation, and other related costs and payments.

3. That it is hereby found and determined that the proposals of the Local Public Agency for the proper relocation of families which may be displaced in carrying out early land acquisition and related activities in connection with the Project in decent, safe, and sanitary dwellings are feasible, and can be reasonably and timely effected to permit the proper carrying out of such activities; and that such dwellings or dwelling units available or to be made available to such facmilies are at least equal in number to the number of the families that may be displaced, are not generally less desirable in regard to public utilities and public and commercial facilities than the dwellings of such families, are available at rents or prices within their financial means, and are readily accessible to their places of employment.

4. That it agrees to assume, and does hereby assume, the responsibility to bear any loss that may arise as a result of the acquisition of land and the undertaking of related activities with financial assistance provided under the Contract in the event that the property so acquired is not used for urban renewal purposes because the urban renewal plan for the project is not approved, or is amended to omit any of the acquired property, or is abandoned for any reason; and this Governing Body further represents that it will enter into a formal Agreement with the Local Public Agency, in form and substance satisfactory to the Administrator, under which it specifically assumes the obligation to pay to the Government upon demand any such loss sustained by the Government under its Contract

with the Local Public Agency and such Agreement shall be assignable to the Government upon request; and it does hereby authorize and direct the Mayor to have such Agreement prepared by the Common Council for the City pursuant to this Ordinance as well as to enter into and execute said Agreement for and in behalf of the City of Syracuse.

* * *

Adopted.

Ayes: Councilmen Ludovico, Farr, Laskowski, McMahon, Handlin, Steuart, McCarthy, Coburn, Leverton—9.

* * *

Be It Ordained, that the following is a description of the lands to be taken for highway purposes, namely:

"ALL THAT TRACT OR PARCEL OF LAND situated in the City of Syracuse, County of Onondaga and State of New York, being a part of Lots No. 304 and No. 305 of the State Salt Lands, Salt Springs Reservation, and being more particularly described as follows:

"Beginning at a point in the southerly line of Spencer Street, said point being North 54 35 00 East a distance of 236 feet from the intersection of said line of Spencer Street with the easterly line of Leavenworth Avenue, as measured along said line of Spencer Street;

"Thence North 54 35 00 East along said line of Spencer Street, a distance of about 48 feet to its intersection with the westerly bank of Onondaga Creek, as it now exists;

"Thence southerly along said westerly bank of Onondaga Creek, as it now exists, a distance of about 210 feet to its intersection with the easterly line of property of the Syracuse Benzol Company, Inc.;

"Thence southwesterly along said easterly line of the Syracuse Benzol Company, Inc., and its southwesterly prolongation, a distance of about 42 feet to the northeast terminus of Maltbie Street, as it now exists;

"Thence south 57 40 00 West along the northerly line of Maltbie Street, as it now exists, which northerly line is also the southerly property line of the Erie Lackawanna Railroad Company, a distance of about 46 feet to a point;

"Thence northwesterly along a curve of radius 382.15 feet a distance of 240.15 feet to the place of beginning."

This Common Council hereby declares its intention to take and appropriate the above-described lands for the aforesaid purpose; and,

Be It Further Ordained, that the Commissioner of Public Works of the City of Syracuse be and he hereby is authorized to make or cause application to be made to the Supreme Court of the State of New York or the County Court of the County of Onondaga, according to law, for the appointment of Commissiners of Condemnation to ascertain and determine the compensation and recompense which should be made to the respective owners, lessees or persons respectively entitled unto or interested in the lands, tenaments, hereditaments and premises to be taken or injured for such purposes, provided, however, that application need not be made to the Court if said premises can be purchased by agree-

ment. In the event of such purchase by agreement without application to the Court, the City shall receive a good and sufficient warranty deed (or executor's deed where required) conveying good and marketable title to the City free and clear of all liens and encumbrances except as above stated, and the owner or owners shall furnish an abstract of title of at least 40

years and a 10 year tax search. Such purchase agreement shall not be consummated until the titles meet the approval of the Corporation Counsel and unless without consideration until the further approval thereof by the Common Council and an appropriation of funds therefor; and,

Be It Further Ordained, that in the event of condemnation, the costs, awards in condemnation, and expenses incidental thereto in accordance with Court Order shall be charged to an appropriate account in the City budget by appropriation by the Common Council; and,

Be It Further Ordained, that the map submitted this day showing the lands to be acquired be approved; and,

Be It Further Ordained, that this ordinance shall be subject to the approval of the Board of Estimate.

Adopted.

Ayes: Councilmen Ludovico, Farr, Laskowski, Handlin, Steuart, McCarthy, Coburn, Leverton—8.

Councilman McMahon abstained from voting.

* * *

Supreme Court, U. S.
FILED
AUG 12 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-77

IN THE MATTER OF THE APPLICATION OF HOWARD J. O'BRIEN, JR., as EXECUTOR OF THE ESTATE OF HOWARD J. O'BRIEN, Deceased, and F. STUART O'BRIEN,

Petitioners-Appellants,

— *vs* —

CITY OF SYRACUSE, ERNEST W. SPEACH, COMMISSIONER, and SYRACUSE URBAN RENEWAL AGENCY, JOHN W. HILDEBRANDT, ASSISTANT SECRETARY,

Respondents-Appellees.

ON APPEAL FROM NEW YORK STATE COURT OF APPEALS

MOTION OF APPELLEES TO DISMISS APPEAL

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Respondents-Appellees.

ON APPEAL FROM NEW YORK STATE COURT OF APPEALS

MOTION OF APPELLEES TO DISMISS APPEAL

Appellees move this Court to dismiss the appeal herein on the following grounds:

(1) the appeal is not taken in conformity with 28 U.S.C. 1257(2); and

(2) the appeal does not present substantial federal questions.

Since this Court may treat the papers of a case, not properly before it by appeal, as a petition for a writ of certiorari, Appellees further request that a writ be denied because no substantial federal questions are present for this Court to review.

FACTS

This case is an appeal from a judgment of the New York State Court of Appeals which dismissed Appellants' appeal to that court upon the ground that no substantial constitutional question was directly involved. (Jurisdictional Statement, page two)

The Appellants were owners of certain commercial properties located within an Urban Renewal Plan Area. Many parcels within this Area were acquired by Appellees and, after long negotiations with Appellants, Appellees offered to purchase their property for $210,000.00. However, the United States Department of Housing and Urban Development ("H.U.D.") disapproved the payment of such a sum and neither H.U.D. nor the Common Council of the City of Syracuse decided to institute condemnation proceedings to acquire the property.

Appellants thereafter commenced this action and attempted to prove a "de facto" taking of their property in violation of the Fifth Amendment to the Constitution. Following a trial in New York State Supreme Court Appellants' complaint was dismissed for failure to prove a prima facie case as a matter of law and the dismissal was affirmed, on the law and the facts, by the Appellate Division of Supreme Court. At the trial Appellants presented many acts which they alleged constituted a "taking" by the Appellees. Both the trial court and the Appellate Division considered each of these claims and rejected them (Jurisdictional Statement, page A10) and thereafter the New York Court of Appeals dismissed Appellants' appeal to that court.

POINT I

APPELLANTS' APPEAL IS NOT PROPERLY WITHIN THIS COURT'S JURISDICTION.

Title 28 U.S.C. 1257(2) provides that state court judgments may be reviewed by this Court

* * * * * * * * *

> (2) by appeal, where is drawn into question the validity of any statute of any state on the grounds of its being repugnant to the Constitution.

Although Appellants rely on this section to support jurisdiction in this Court, the statutes listed in their jurisdictional statement were not relied on or even mentioned by the state courts below in their decisions. The courts below did not hold the statutes valid or invalid against constitutional attack because Appellants never attacked the constitutionality of these statutes below. The case at bar presented a factual question: whether Appellees' actions constituted a "de facto" taking of Appellants' property.

Accordingly, this Court is without jurisdiction under 28 U.S.C. 1257(2) to review by appeal the judgment of the New York State Court of Appeals.

POINT II

THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS PRESENTED AND CERTIORARI SHOULD NOT BE GRANTED.

Appellants request this Court to detail the standards for determining what governmental acts constitute a "taking" under the Fifth Amendment to the Constitution. However, this court has considered this issue on many prior occasions and it has held that there is no prescribed formula to determine when a "taking" occurs. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed.2d 130; *Smyth* v. *Ames*, 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819. Of necessity, this court has formulated broad guidelines.

> This case and many others reveal the difficulty of drawing the line between what destructions of property by lawful governmental actions are compensable "takings" and what destructions are "consequential" and therefore not compensable. (citations omitted)
> *Armstrong* v. *U.S.*, 364 U.S. 40, 80 S. Ct. 1563, 5 L. Ed. 2d 1554

It has been held that governmental acts which do not directly encroach on private property but which may impair its use do not entitle an owner to compensation. *Northern Transport Co.* v. *Chicago*, 99 U.S. 635, 25 L. Ed. 336; *Gibson* v. *U.S.*, 166 U.S. 269, 17 S. Ct. 578, 41 L. Ed. 996. And, this court has held that the character of the invasion of private property and not the resulting damages, determine what acts constitute a "taking". *U.S.* v. *Cress*, 243 U.S. 316, 37 S. Ct. 380, 61 L. Ed. 746.

In fact, this Court has noted that a reduction in the value of an owner's property as a result of valid governmental acts is a risk of ownership.

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense. *Danforth* v. *U.S.*, 308 U.S. 271, 285

The decisions of the courts of New York and in the matter at bar are in accord with the decisions of this Court. In *City of Buffalo* v. *Clement*, 28 N.Y.2d 241, the landmark New York case, the Court of Appeals followed the decisions of this court and established the rule that, absent the most "obvious injustice", a physical invasion or direct legal restraint is necessary to establish a "de facto" taking.

The Appellate Division decision in the case at bar followed *City of Buffalo* v. *Clement* and further stated that even if appellant's allegations were conclusively proven ". . . they would not, taken cumulatively, constitute the dominion and control necessary to establish a de facto taking." (page A11 Jurisdictional Statement)

Appellants' alleged federal question is, in fact, a request to this Court to review the facts found below and determine that a "taking" has occurred. This is not a proper case for the exercise of this court's discretion to independently analyze the findings of the state courts below. *Pennekamp* v. *State*, 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295.

The record as a whole reveals no compensable "taking" under any theory heretofore adopted by this court. As the previous discussion of this court's decisions indicates reduction in the value of property by reason of governmental acts which do not directly limit the use of property and which do not effect dominion and control over the property are not "takings" in the constitutional sense. These reductions in value are, at most, "consequential" and must be accepted as one of the incidents and risks of ownership. *Danforth* v. *U.S.*, supra; *Gibson* v. *U.S.*, supra; *Armstrong* v. *U.S.*, supra; *U.S.* v. *Cress*, supra.

This Court has formulated the guidelines Appellants request. Upon applying those guidelines to this case it is clear the facts do not establish any de facto or other "taking" nor present substantial federal questions.

POINT III

APPELLANTS' APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED WITH COSTS.

Respectfully submitted,

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